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The Supreme Court and Trade Dress - A Short Comment

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**The Supreme Court and Trade Dress — A
Short Comment**

by
WILLIAM P. KRATZKE*

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I

Introduction

In the space of nine years, the United States Supreme Court has decided four cases concerning matters of trade dress and functionality. In so doing, the Court has positioned the doctrine of functionality so that it is broader and trade dress protection for product configuration (not packaging) so that it is correspondingly narrower than many may wish. The Court has quite correctly concluded that the trade dress of a product itself, while potentially a source identifier for consumers, should not be treated as if it were a more ordinary trademark¹ for the simple reason that consumers do not expect such trade dress to serve an identificatory² or informational function, i.e., to function as a trademark. Thus, the Court has redefined the protection of trademarks in a way that hopefully restores the interests of consumers to a position paramount to the interests of competitors.

The first two sections of this comment examine some basic trademark principles. The third section examines the opinions of the four Supreme Court cases, noting the shift in trade dress and functionality doctrines in the broader context of trademark theory. This comment concludes that trademark law, as it applies to matters of trade dress, more accurately meets the expectations of consumers and serves their interests than it did nine years ago.

II

Trademark Principles³

Trademark law is a system of conditional and limited entitlements that should help to maximize overall societal value. A trademark is a word, name, symbol, or device — a phrase with perhaps an unlimited scope⁴ — that identifies and distinguishes the

1. This comment uses the term “trademark” to refer to “trademark” or “service mark.”

2. This term is defined at Webster’s Third New International Dictionary (unabridged) 1123 (1993) as “concerned with or serving for identification.”

3. This section is derived from my article, William P. Kratzke, *Normative Economic Analysis of Trademark Law*, 21 U. Mem. L. Rev. 199 (1991).

4. See *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 164 (1995) (“It is the source- distinguishing ability of a mark – not its ontological status as color, shape, fragrance, word, or sign – that permits it to serve” the basic purposes of a trademark.); but see Glynn S. Lunney, Jr., *The Trade Dress Emperor’s New Clothes: Why Trade Dress Does*

user's trademarked products or services from others' products or services. Trademarks must perform this identificatory function for consumers and inform consumers of *material* information. Material information is information that may actually affect a consumer choice.⁵ A recognized trademark may inform the consumer of a product's source or quality, as well as other less relevant factors related to consumer choice. Moreover, the consumer must *rely* on a product's identificatory and informational feature in making a choice — as opposed to merely recognizing the feature as an aspect of the product she or he has already chosen.⁶

Trademarks have the characteristic that once they exist, they are non-rivalrous in consumption, i.e., they are not scarce, and use by one does not reduce the supply for use by another. Hence, legally enforceable rights of exclusivity exist only because trademark law, in pursuit of some public policy, states that they should. In order to maximize value to consumers and to society as a whole, public policy in the United States favors a competitive market economy, one that rewards producers who sell the goods and services that consumers want in terms of quality, quantity, and price. No other system succeeds in maximizing consumers' utility — or maximizing anything else, for that matter — as well as a competitive market economy.

Trademark law in turn enhances the performance of a competitive market economy by recognizing the right of particular users of trademarks to use those marks for particular purposes exclusively. Such exclusive use enables consumers to identify and distinguish products in the market so that they make accurate purchasing decisions quickly. Consumer association of a mark with a certain level of quality also facilitates entry into other markets, thereby increasing competition.

Not Belong on the Principal Register, 51 Hastings L.J. 1131, 1133-62 (2000) (tracing missteps in evolution of this position); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 Emory L.J. 367, 380 (1999) (legislative history of Lanham Act indicated that "trademark" not intended to include trade dress or product features).

5. See *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 46 (1st Cir. 1991) (stating that a television viewer is not particularly concerned about relation between station and event-sponsor); *Bd. of Governors of the Univ. of N.C. v. Helpingstine*, 714 F. Supp. 167, 173 (M.D. N.C. 1989) (holding that more than identity of marks must be shown when purchasers of tee-shirts do not care whether registrant sponsors or endorses product).

6. See Lunney, *The Trade Dress Emperor's New Clothes*, *supra* n. 4, at 1159-60. ("Consumers may recognize the shape of a kitchen stand mixer or a golf course hole, but that does not necessarily mean that consumers are relying on the shape to identify the product's source, particularly where the product is otherwise properly labeled." (footnotes omitted)).

Absent an informational and identificatory function, the law should accord putative trademarks no protection.⁷ It is the province of patent and copyright law to provide protection to creative efforts that do not yield informational and identificatory benefits to consumers.⁸ The law's recognition of an exclusive interest in identificatory and informational devices encourages producers to produce goods of consistent and high quality: consistent so that consumers are not disappointed by the performance of a product or service and thereafter patronize a different provider, and high so that the informational value of the trademark, which might be captured completely by the seller, is as great as possible. Trademarks reduce consumers' search. Use one's trademark by another may constitute infringement, and, if so, raises consumers' search costs. Trademarks reflect a reputation on which consumers rely.

Users of marks should have certain exclusive rights of use when such exclusivity enhances the performance of a competitive market economy in creating value for the persons for whom such an economy exists, i.e., consumers. Such value is created only when the putative trademark *does*, in fact, provide information regarding the product or service to consumers.

Until a word, name, symbol, or device plays some informational and identificatory role with respect to a product, it has no value. This informational and identificatory role that trademarks play in assisting consumers to determine and make purchasing choices is the source of a trademark's value.

However, value, in the sense that someone would be willing to pay for something, might exist if the law protects competitors' interests irrespective of any consumer benefit. For example, value to consumers may be created through competition in the putative product identifier itself,¹⁰ as occurs when the putative identifier is

7. See generally Lunney, *Trademark Monopolies*, *supra* n. 4, at 484 (arguing that preventing consumer deception should be basis of trademark rights, not property).

8. *Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

9. Kratzke, *supra* n. 3, at 205.

10. See *Kellogg Co. v. Natl. Biscuit Co.*, 305 U.S. 111, 122 (1938) ("Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all – and in the free exercise of which the consuming public is deeply interested.").

“functional.”¹¹ Nevertheless, those entitled to use a trademark exclusively for identificatory and informational purposes often claim entitlements that extend to functional use of the mark.¹² The existence of such value is no reason for trademark law to protect it.¹³ Rather, the law should reflect a policy of maximizing value, and it does that by maximizing value to consumers. Net value is maximized for consumers when free competition in the functional feature occurs rather than when exclusive rights of use are given to one user.¹⁴ The lower prices that competition generates enable more consumers to enjoy products that make functional use of marks, while paying a price no higher than the seller’s marginal cost. Foregoing such a consumer benefit is a needlessly incurred loss.

The competitive market economy depends upon interbrand competition to maximize benefits to consumers. Therefore, legal protection of trademarks should be limited to occasions where they promote such competition. Any alternative principle elevates interests other than consumers’ to a paramount position and foregoes consumer value. Legal protection of trademarks facilitates interbrand competition by providing consumers with information about products and services, and by facilitating entry into markets, thereby increasing the level of competition. Consumers quickly and accurately reward the providers who give them the greatest value, and they implicitly punish those who do not. More entrants into a market means greater choice for consumers.

A redistribution of wealth among competitors on a basis other than benefit to consumers is not a costless transaction and does not create or enhance consumer value. Such redistributions are not value maximizing. To the extent they are based on market power, consumers who are willing to pay the marginal cost of producing the product but who are denied access to it because the price is higher than its marginal cost, forego value. There is a further reduction in overall wealth *because* redistributions are not costless. Limiting the

11. Kratzke, *supra* n. 3, at 205.

12. *But see e.g. Boston Prof. Hockey Assn., Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975) (involving the unlicensed use of logos of National Hockey League teams on patches), *cert. denied*, 423 U.S. 868 (1975).

13. *See Internatl. News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) (gathering and disseminating news; existence of property not dependent on value but upon exclusion by law from interference).

14. *See Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1194-95 (S.D.N.Y. 1983) (stating that more consumers would purchase products if any competitor who wanted to serve them were permitted to do so).

law's protection of trademarks to their identificatory and informational power is not unfair to sellers who seek rewards for themselves on a basis other than maximizing consumer value because competitors implicitly agree to the rules of competition when they undertake to play. Moreover, the source of their market success should be quality products, not artificially maintained market power.

The identificatory and informational power of a putative trademark takes on varying degrees of materiality depending on when and how consumers benefit from such trademark roles. When a consumer uses such information to select which of several alternatives he or she will buy, the materiality of that information is the greatest possible as the consequences of inaccurate information are direct pecuniary loss. Moreover the consequences of such a direct loss are that the wrong competitor benefits and the wrong competitor loses, which is the reason competitors may sue each other vicariously to avenge consumers' losses. We recognize the use of inaccurate information of this sort as passing off. However there are other identificatory and informational uses of a trademark that may provide very little material information to consumers, such as when the trademark implies, perhaps only in the weakest manner, immaterial sponsorship or endorsement.¹⁵ Even if a consumer is wrong in his or her impressions regarding the substance of such information, he or she incurs little or no injury if he or she simply does not care. Such information, if accurate, would not have changed the consumer's purchasing choice, and thus it is not material. Treating trademark use in such situations as exclusive bestows market power with no benefit to consumers.

The material identificatory and informational power of a putative trademark or source identifier is relevant to the protection that the law should accord it. Call this material identificatory and informational power " I "; call the first user " F " and second (and any subsequent) user " s ." Trademark law should protect a putative product identifier only when the identifier actually imparts information to consumers, i.e., when $I_s > 0$.¹⁶ If competition is an important public policy, and it is, the cost to subsequent competitors of competing on the same basis as the first user of a putative product identifier is also relevant to whether the law should protect one user's interests at the expense of another's. Call the cost of competing " C ."

15. See *WCVB-TV*, 926 F.2d at 46; Bd. of Governors of the Univ. of N.C., 714 F. Supp. at 173.

16. This is *not* the same as saying that $I_s \geq 0$.

Trademark law should permit a presumptively equally capable enterprise to that of the first user of a putative product identifier to create the same type of identifier for a cost no greater than that incurred by the first user. If the supply of the same type of identifiers is small, then the cost to such a competitor of competing on the same basis is great. Conversely, if the supply of the same type of identifier is great, then the cost to such a competitor of competing on the same basis is small, and the informational and identificatory power of such a mark is great.¹⁷

Consumers have the greatest interest in the law's protecting putative product identifiers when I_r is great and C_s is small. We can make a ratio to measure the efficiency with which messages are imparted.¹⁸ If I_r/C_s is great, then the law should accord the first user a protectible interest in its identifier. The value of this quotient will be great when I_r is great, e.g., when a trademark is well-recognized by consumers, perhaps because it has strong secondary meaning. The value of this quotient will be great when C_s is small, e.g., when the mark is arbitrary or fanciful thus implying that there are many alternatives that can be cheaply chosen. If the value of C_s is very low, e.g., the first user's mark is inherently distinctive, trademark law protects the first user's mark even if I_r is also small because the value of I_r/C_s is large. But this can only be true if I_r has some value, which it may simply by virtue of the fact that consumers affirmatively look to the identificatory and informational feature, such as a logo, to impart information. Conversely, the value of this quotient will be small when I_r is small, e.g., when a descriptive term has no secondary meaning. When a product feature neither identifies the product nor generates the least consumer expectation that it will, $I_r = 0$. Such a putative identifier is not entitled to the status of "trademark." So also, the value of this quotient will be small when C_s is great, e.g., when the putative source identifier is a generic term or a functional feature.

These variables and the resulting ratios can be applied to the United States Supreme Court's recent holdings in the trade dress

17. See *France Milling Co. v. Washburn-Crosby Co.*, 7 F.2d 304, 306 (2d Cir.) ("If the name or mark be truly arbitrary, strange, and fanciful, it is more specially and peculiarly significant and suggestive of one man's goods, than when it is frequently used by many and in many differing kinds of business."), *cert. denied*, 268 U.S. 706 (1925); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & Econ. 265, 276 (1987) ("[T]he greater W is (that is, the larger the universe of possible names for X), the greater will be the productivity of a firm's trademark in reducing search costs for its brand.").

18. Obviously these values cannot be quantified, but they are easily conceptualized.

area. First, this comment examines some principles that have evolved from earlier decisions of the Supreme Court, which maximized the value of I/C.

III

Copying, Functionality, and the Distinction Between Them

The United States Supreme Court defined the scope of patent law and free competition policies vis-a-vis state law in three significant decisions.¹⁹ The preemptive scope of the *Sears/Compco/Bonito Boats* doctrine is both restrictive and permissive. It is restrictive in that it precludes competition on matters for which there is a utility patent; it is permissive in that it requires that there be free competition in everything else,²⁰ including creative and unique features. Thus, if a product feature is not patentable, those features may be freely copied by competitors.²¹ The only exception to this is if the feature identifies the product to consumers, but only if exclusivity of the feature does not inhibit competition, a condition that is applied in the doctrine of functionality.²²

The United States Supreme Court addressed the standards or tests for functionality of trade dress in the case of *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*²³ In that case, plaintiff-respondent Ives had a patent on a drug that it marketed to hospitals in blue capsules for one dosage and in blue-red capsules for a different dosage.²⁴ The patent expired and defendants-petitioners began marketing a generic copy of the drug and used the same colors for their capsules for the same dosages.²⁵ Ives made several claims against petitioners, one of which was that the capsules' colors were

19. See *Bonito Boats, Inc. v. Thundercraft Boats, Inc.*, 489 U.S. 141 (1989); *Compco Corp. v. Day Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

20. *Bonito Boats*, 489 U.S. at 151 ("To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use." (citation omitted)); *Compco Corp.*, 376 U.S. at 237 (holding that state law may not forbid copying of unpatented article); *Sears*, 376 U.S. at 231 (holding that an unpatented article is in public domain and competitor has right to copy it).

21. See Theodore H. Davis, Jr., *Copying in the Shadow of the Constitution: The Rational Limits of Trade Dress Protection*, 80 Minn. L. Rev. 595, 596 (1996) (arguing that there is a constitutional right to copy).

22. See *id.* at 611.

23. 456 U.S. 844, 846 (1982).

24. *Id.* at 847.

25. *Id.*

not functional and had developed secondary meaning to consumers.²⁶ The United States Federal District Court for the Eastern District of New York ruled against Ives on this claim,²⁷ but the United States Second Circuit Court of Appeals, without addressing the question of functionality, reversed on other grounds.²⁸ The Supreme Court reversed.²⁹ The Court stated that “a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.”³⁰

This definition of functionality is in the alternative. The first part requires that a feature be *essential* in order to be functional, surely a very high standard of functionality,³¹ for very few product features in which anyone would try to claim an exclusive interest are truly essential in the sense that the product could not exist without them. The second part, the alternative definition, establishes a much lower threshold of functionality. Surely there are many, if not most, features of products that affect their cost or quality but are not essential to the use or purpose of the article. By melding these alternatives together, or by simply focusing on competitive need, lower courts could raise the standard of functionality considerably above merely affecting cost or quality. Effective competition depends on competitors having equal access to the features of a product that make it a marketing success, including features that appeal to the aesthetic tastes of consumers,³² not merely the utilitarian features.³³ If an aesthetic feature appeals to consumers, it is not enough to warrant exclusive protection that competitors could design the same feature another way if that feature has no material identificatory and informational power in the hands of the first user.

In federal courts where Section 43(a) of the Lanham Act³⁴ is

26. *Id.* at 850.

27. *Id.* at 851.

28. *Id.* at 853.

29. *Id.*

30. *Id.* at 850 n. 10.

31. See Ralph S. Brown, *Design Protection: An Overview*, 34 U.C.L.A. L. Rev. 1341, 1361 (1987) (noting that essentiality is not sole determinant of functionality).

32. *Pagliero v. Wallace China Co.*, 198 F.2d 339, 343-44 (9th Cir. 1952).

33. *W.T. Rogers Co. v. Keene*, 778 F.2d 334, 346 (7th Cir. 1985) (“A feature can be functional not only because it helps the product achieve the objective for which the product would be valued by a person indifferent to matters of taste, charm, elegance, and beauty, but also because it makes the product more pleasing to people not indifferent to such things.”).

34. 15 U.S.C. § 1125(a) (1997):

applicable, Professor McCarthy notes that “functionality” has become a doctrine that accommodates the policies of trademark (trade dress), patent law, and free competition.³⁵ If he is correct, the doctrine of functionality has swallowed up, and now defines the right to copy.³⁶ Lower courts have taken the Supreme Court’s definition and embellished it to the point that, as McCarthy observes, “[i]t seems that there are as many definitions of what is ‘functional’ as there are courts.”³⁷ Lower courts often focus on the availability of alternatives,³⁸ rather than on whether the design was an important ingredient in the marketing success of the product, or for that matter, whether the feature has any informational and identificatory power at all.³⁹

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

35. 1 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7.63 (4th ed., West 2001) (Functionality accommodates trade dress law, patent law, and free competition.).

36. See *Keene Corp. v. Paraflex Indus., Inc.*, 653 F.2d 822, 826 (3d Cir. 1981) (“Proof of nonfunctionality generally requires a showing that the element of the product serves no purpose other than identification.” (quoting *SK&F, Co. v. Premo Pharmaceutical Laboratories, Inc.*, 625 F.2d 1055, 1063 (3d Cir. 1980))).

37. McCarthy, *supra* n. 35, at § 7.69 (referring to utilitarian functionality).

38. See e.g. *Marketing Displays, Inc. v. TrafFix Devices, Inc.*, 200 F.3d 929, 940 (6th Cir. 1999) (“The appropriate question is whether the particular product configuration is a competitive necessity.”), *rev’d*, 532 U.S. 23 (2001).

39. See e.g. Lunney, *The Trade Dress Emperor’s New Clothes*, *supra* n. 4, at 1159-60 (Lower courts have protected trade dress in absence of evidence of consumer reliance on packaging or appearance to identify product’s source, in absence of showing that trade dress even functions as a trademark.).

The Supreme Court in *Sears/Compco/Bonito Boats* implied that a competitor's right to copy a utilitarian feature of a product may have one of two bases insofar as state law is concerned.⁴⁰ These bases are not co-terminal. A competitor may copy any product or feature, including those that are clever, ornate, unique, so long as the copied feature does not cause confusion "as to who had manufactured . . . nearly identical articles."⁴¹ A competitor may copy any functional feature of a product, even if it (for a time) performs an informational and identificatory function. If a feature is functional and a competitor copies it, trademark law contemplates some confusion in order to establish competition.⁴² Thus non-functionality is not a counterpoise to a right to copy, and functionality is not a necessary condition to a right to copy.

When an aesthetic feature rather than a utilitarian feature is involved, Section 43(a) of the Lanham Act is usually the basis of plaintiffs' claims for trade dress infringement because rarely, except for color, is an aesthetic feature registered. Congress enacted Section 43(a) to prevent falsehoods, not competitive copying, as the language of the statute still⁴³ makes clear. Unfortunately, it has evolved into a federal unfair competition statute, developing in the way of the common law, incrementally.⁴⁴ It is now clear that the rules just noted concerning utilitarian features that apply to the states do not apply to aesthetic features in federal courts in Section 43(a) cases or to states under their anti-dilution statutes. Protection may be accorded to product features that are neither distinctive nor have secondary

40. *Bonito Boats*, 489 U.S. at 145; *Compco Corp.*, 376 U.S. at 238; *Sears*, 376 U.S. at 231-32.

41. *Sears*, 376 U.S. at 232 ("mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied").

42. See *Kellogg Co.*, 305 U.S. at 121 (explaining that copier's obligation is not to ensure that there is *no* confusion whatsoever but to use every reasonable means to prevent confusion).

43. Section 43(a) was amended by the Trademark Law Revision Act of 1988. Pub. L. No. 100-667, tit. I, 102 Stat. 3935 (1988); Brown, *supra* n.31, at 1384.

44. Cf. Mitchell M. Wong, Note, *The Aesthetic Functionality Doctrine and the Law of Trade Dress Protection*, 83 Cornell L. Rev. 1116, 1163-64 (1998) ("Not all intellectual creations are legally entitled to protection. In the current stage of intellectual property's development, creations that deserve protection sometimes fall through the cracks at the interstices between the domain of patent, copyright, and trademark. As tempting as it may be to extend trademark law in order to rescue those creations from imitation by underserving competitors, it is not the role of trademark law to serve as a catch-all mechanism for the protection of intellectual creations which are not currently protected by another body of intellectual-property law.") (footnote omitted).

meaning that inform consumers of the product's identity.⁴⁵ "The explosion in product configuration cases in the last twenty years has a lot more to do with acquiring or extending de facto patent and copyright protection through a back door than with protecting consumers from confusion."⁴⁶

Sears/Compco/Bonito Boats define the pre-emptive scope of federal patent law vis-a-vis state law and clearly not vis-a-vis Section 43(a).⁴⁷ But the policies that the United States Supreme Court named in *Sears/Compco/Bonito Boats* to support its holdings are just as appropriate in Section 43(a) cases involving aesthetic features.

[T]he same principle that motivated the *Sears*, *Compco*, and *Bonito Boats* decisions — namely, the right of free imitation of publicly known, unpatented articles — should guide the interpretation of section 43(a). In short, section 43(a) should not be applied in a way that circumvents the policies underlying federal patent law.⁴⁸

Insofar as functionality is concerned, the consumer's interest in competition requires that competitors be able to compete on equal terms. The putative trademark that does not function as a source identifier should not be treated as a trademark at all, and it should be freely copiable.⁴⁹ But the availability of alternatives to the subsequent user of a putative trademark that *does* function as a source identifier that are equally as low in cost as that incurred by the first user is surely relevant, for it is the essence of C_s. These considerations are not consistently applied in cases involving issues of functionality. There is hardly agreement on what is necessary for competition to be

45. See Lunney, *The Trade Dress Emperor's New Clothes*, supra n.4, at 1159-60; Deborah F. Buckman, Annotation, *When Is Trade Dress "Inherently Distinctive" for Purposes of Trade Dress Infringement Under § 43(a) of the Lanham Act*, 161 A.L.R. Fed. 327, 356-58 (2000) (Section 10, citing court opinions protecting product configuration trade dress found to be inherently distinctive).

46. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1705 (1999).

47. *Bonito Boats*, 489 U.S. at 145; *Compco Corp.*, 376 U.S. 238; *Sears*, 376 U.S. at 231-32.

48. Melissa R. Gleiberman, Note, *From Fast Cars to Fast Food: Overbroad Protection of Product Trade Dress Under § 43(a) of the Lanham Act*, 45 Stan. L. Rev. 2037, 2061 (1993) (footnotes omitted).

49. See *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1343 (C.C.P.A. 1982) (The court stated that "[o]ne who seeks to register (or protect) a product or container configuration as a trademark must demonstrate that its design is 'nonfunctional,' . . . and that the design functions as an indication of source . . . These two requirements must . . . be kept separate from one another.").

on equal terms when it comes to such matters as restaurant decor,⁵⁰ color of dry cleaning press pads,⁵¹ children's seersucker outfits,⁵² or the number of springs necessary for a device that prevents temporary road signs from blowing over in high winds.⁵³ The existence of patent law may broaden utilitarian functionality, but courts give aesthetic functionality a considerably narrower reach: "[A]s applied in a large number of cases, the requirement of nonfunctionality has not significantly hindered the protection of attractive product features that are an integral part of consumer demand for the product itself."⁵⁴ The Lanham Act does not exist to encourage creative efforts, contrary to the holdings of some courts when defining the scope of and applying Section 43(a).⁵⁵ Nevertheless, one commentator concluded that "tests for functionality do not ask what may be protected, but rather what may not."⁵⁶

If trade dress serves as a source identifier, then it can do so only if it has acquired secondary meaning. No putative source identifier can serve as such unless consumers actually treat it as such or at least expect it to act as such.⁵⁷ The vast majority of putative source identifiers do not function in this manner.⁵⁸ "Unless the public has come to know a particular mark as indicating a particular source of origin, a finding of the requisite falsity would be anomalous since there would be no standard against which to measure such falsity."⁵⁹

50. *Two Pesos, Inc. v. Taco Cabana Intl., Inc.*, 505 U.S. 763 (1992).

51. See *Qualitex*, 514 U.S. 159.

52. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000).

53. *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001). In the four United States Supreme Court cases to be discussed *infra*, the different courts that heard each case were in agreement only in *Two Pesos*.

54. Gleiberman, *supra* n. 48, at 2061.

55. *Id.* at 2056-57 (noting purposes of Lanham Act and court's adoption of such a purpose as a basis of § 43(a)).

56. Wong, *supra* n. 44, at 1154.

57. Cf. Daniel J. Gifford, *The Interplay of Product Definition, Design and Trade Dress*, 75 Minn. L. Rev. 769, 792 (1991) ("The product characteristics protected by trade dress are, like design, open and unconcealed. Information scarcity has a limited role here, because it is not the unknown part of the product or service to which trade dress relates. For products whose full characteristics are not apparent upon inspection, design protection identifies the source and thereby provides purchasers an assurance of quality for the unknown part of the product. For products whose entire range of characteristics are apparent upon inspection, however, trade dress protection of design does not provide any assurance of quality.").

58. Lemley, *supra* n. 46, at 1704.

59. *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299, 303 (2d Cir. 1981)(quoting Kenneth B. Germain, *Unfair Trade Practices Under Section 43(a) of the Lanham Act: You've Come a Long Way, Baby Too Far, Maybe?*, 49 Ind. L.J. 84, 103

Failure to recognize this may lead to protection of unpatented products from copying of utilitarian or functional features by competitors, contrary to the teachings of *Sears/Compco/Bonito Boats* and contrary to the interest of consumers in “true” interbrand competition.⁶⁰ A conclusion that a product’s design is “inherently distinctive” and therefore protectible⁶¹ implicitly relies upon a determination that the presence of competition on equal terms is equivalent to a product’s trade dress having some positive informational and identificatory value. This determination is most certainly not accurate.

IV Recent Cases

The United States Supreme Court has recently explored the parameters of trade dress protection.⁶² This comment examines the work of the Court in these cases and evaluates it against the basic trademark principles previously set forth.

A. *Two Pesos, Inc. v. Taco Cabana, Inc.*

In *Two Pesos, Inc. v. Taco Cabana, Inc.*⁶³ the United States Supreme Court held that a restaurant’s inherently distinctive trade dress could be protected under Section 43(a) of the Lanham Act

(1973)).

60. *Contra* Gifford, *supra* n. 57, at 787 (“Competition in product design furthers the social interest in maximizing consumer choice. . . . So long as there is no limit on potentially attractive designs, no one producer will be able to exploit its own design for more than the premium commanded by the relative value of that design vis-a-vis all other designs in competition with it.”); see also Diana Elzey Pinover, *Aesthetic Functionality: The Need for a Foreclosure of Competition*, 83 Trademark Rep. 571, 577 (1993) (The aesthetic functionality doctrine provides “disincentive[s] for development of imaginative and attractive design”; proposing that aesthetic functionality should be a defense only when failure to do so would foreclose competition.); Robert Unikel, *Better by Design: The Availability of Trade Dress Protection for Product Design and the Demise of “Aesthetic Functionality*, 85 Trademark Rep. 312, 332-42 (1995) (arguing for broad “penumbra of protection” of product design).

61. See Buckman, *supra* n. 45, at 359-71 §§ 12(a), 13(a), 14, 16(a), 18, 21, 22 (noting that clothing, furniture, food products (Pepperidge Farm Goldfish cheese crackers), toys, golf clubs, golf hole, and theme restaurants have been protected because inherently distinctive).

62. See *TrafFix*, 530 U.S. 1260; *Wal-Mart*, 529 U.S. 205; *Qualitex*, 514 U.S. 159; *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

63. 505 U.S. 763.

without proof of secondary meaning.⁶⁴ The plaintiff-respondent in the case, Taco Cabana, Inc., operated a chain of fast-food Mexican restaurants in Texas.⁶⁵ It opened in 1978 and expanded to six restaurants by 1985, all in the San Antonio area.⁶⁶ Plaintiff described its trade dress as:

“[A] festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paints and neon strips. Bright awnings and umbrellas continue the theme.”⁶⁷

Two Pesos, Inc. opened a restaurant in Houston with a similar motif,⁶⁸ and then expanded rapidly in Houston and into other markets, but not into San Antonio.⁶⁹ Taco Cabana entered the Houston and Austin markets in 1986,⁷⁰ and expanded into other Texas cities.⁷¹ Inevitably, Two Pesos and Taco Cabana had competing restaurants in several Texas cities.⁷²

Taco Cabana sued Two Pesos.⁷³ A jury answered questions propounded by the trial judge thus: Taco Cabana had a non-functional, inherently distinctive – because not descriptive⁷⁴ – trade dress that lacked secondary meaning, and Two Pesos’ concurrent use of its motif created a likelihood of confusion on the part of ordinary customers as to the source or association of its goods or services.⁷⁵ It was sufficient for Taco Cabana to recover if its mark either was inherently distinctive or had acquired secondary meaning.⁷⁶ The

64. *Id.* at 776.

65. *Id.* at 765.

66. *Id.*

67. *Id.* at 765 (quoting *Taco Cabana Intl., Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1117 (5th Cir. 1991)).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 765-66.

74. *Id.* at 766 n. 3.

75. *Id.* at 766.

76. *Id.*

United States Court of Appeals for the Fifth Circuit rejected defendant-petitioner's argument that a finding of no secondary meaning contradicted a finding of inherent distinctiveness.⁷⁷

The Court of Appeals perceived that its opinion conflicted with the view of the United States Court of Appeals for the Second Circuit,⁷⁸ which held in *Vibrant Sales, Inc. v. New Body Boutique, Inc.*,⁷⁹ a case involving a waist reducing belt,⁸⁰ that Section 43(a) of the Lanham Act protects unregistered trademarks or designs only when there is secondary meaning.⁸¹ Instead, the Court of Appeals for the Fifth Circuit applied the rule⁸² of *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*,⁸³ a case involving the trade dress of bottles that contained lawn and garden chemicals,⁸⁴ that an inherently distinctive trade dress could be protected under Section 43(a), even without proof of secondary meaning.⁸⁵ The Supreme Court granted certiorari "to resolve the conflict among the Courts of Appeals on the question whether trade dress that is inherently distinctive is protectible under Section 43(a) without a showing that it has acquired secondary meaning."⁸⁶

The Court began its analysis by noting that

it is common ground that [Section] 43(a) protects qualifying unregistered trademarks and that the general principles qualifying a mark for registration under [Section] 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under [Section] 43(a).⁸⁷

The Court noted the spectrum of marks set forth by Judge Friendly⁸⁸ in *Abercrombie & Fitch Co. v. Hunting World, Inc.*,⁸⁹ i.e., generic,

77. *Id.* at 767.

78. *Id.*

79. 652 F.2d 299 (2d Cir. 1981), *cert. denied*, 455 U.S. 909 (1982).

80. *Id.* at 300.

81. *Id.* at 301.

82. *Two Pesos*, 505 U.S. at 767.

83. 659 F.2d 695 (5th Cir. 1981), *cert. denied*, 457 U.S. 1126 (1982).

84. *Id.* at 696.

85. *Id.*

86. *Two Pesos*, 505 U.S. at 767.

87. *Id.* at 768 (citations omitted).

88. *Id.*

89. 537 F.2d 4, 9 (2d Cir. 1976).

descriptive, suggestive, arbitrary, and fanciful.⁹⁰ The last three categories of marks are deemed to be inherently distinctive.⁹¹ Generic marks are not registrable as trademarks.⁹² Descriptive marks are registrable only upon acquiring secondary meaning.⁹³ “The general rule regarding distinctiveness is clear: an identifying mark is distinctive and capable of being protected if it *either* is inherently distinctive *or* has acquired distinctiveness through secondary meaning.”⁹⁴

The Supreme Court agreed with the United States Court of Appeals for the Fifth Circuit.⁹⁵ “There is no persuasive reason to apply to trade dress a general requirement of secondary meaning which is at odds with the principles generally applicable to infringement suits under [Section] 43(a).”⁹⁶ The Court approved the Fifth Circuit’s rejection of the argument that a finding of no secondary meaning contradicts a finding of inherent distinctiveness.⁹⁷ The necessary implication of this rejection is the legal recognition of a trademark “owner’s legitimate proprietary interest in its unique and valuable informational device, regardless of whether substantial consumer association yet bestows the additional empirical protection of secondary meaning.”⁹⁸

Petitioner-defendant conceded that it is possible for the trade dress of a restaurant to be inherently distinctive,⁹⁹ a costly concession. Having made such a concession, petitioner-defendant was left to make a relatively weak argument that the inherently distinctive trade dress of a restaurant should be subject to defeasance over time if it fails to acquire secondary meaning.¹⁰⁰ Such an approach is contradictory in that an inherently distinctive mark is protectible from its first use without proof of secondary meaning.¹⁰¹ Moreover, “[s]uch a trade dress, or mark, is not subject to copying by concerns that have an equal opportunity to choose their own inherently

90. *Id.* at 8.

91. *Id.* at 10-11.

92. *Id.* at 9.

93. *Id.* at 10.

94. *Two Pesos*, 505 U.S. at 769 (citations omitted; emphasis in original).

95. *Id.* at 767.

96. *Id.* at 769.

97. *Id.*

98. *Id.* at 771 (quoting *Taco Cabana Int’l.*, 932 F.2d at 1120, n. 7).

99. *Two Pesos*, 505 U.S. at 771.

100. *Id.*

101. *Id.*

distinctive trade dress.”¹⁰² Failure to acquire secondary meaning would be grounded upon lack of success in the marketplace, which is not a valid basis upon which to deny protection.¹⁰³ “The user of such a trade dress should be able to maintain what competitive position it has and continue to seek wider identification among potential customers.”¹⁰⁴

The Court discussed the evolving position of the Second Circuit, noting that it seemingly denied protection under Section 43(a) for unregistered but distinctive marks whether “words or symbols or distinctive product design.”¹⁰⁵ The Court indicated that such a holding is in considerable tension with Section 2 of the Lanham Act,¹⁰⁶ which denies registration for marks without secondary meaning only if the mark is descriptive.¹⁰⁷ The Court observed that the Second Circuit may have limited its denial of protection to marks without secondary meaning to trade dress.¹⁰⁸ The Court rejected this view saying that if trade dress is capable of inherent distinctiveness, secondary meaning is not required to accord the mark protection under Section 43(a).¹⁰⁹ “There is no persuasive reason to apply different analysis to” trade dress cases and other types of trademarks under [Section] 43(a).”¹¹⁰

The Court observed that the Lanham Act affirmatively required secondary meaning only for the registration of descriptive marks under Section 2 and that there is no textual basis for requiring secondary meaning under Section 43(a).¹¹¹ The Court also observed that the functionality doctrine adequately protected competition¹¹² and that requiring secondary meaning to protect trade dress under Section 43(a) could have anticompetitive effects by making it more difficult for startup firms to start a new product in a limited area and then expand into new markets.¹¹³

Justice Stevens concurred in the holding that once distinctiveness of trade dress is established, secondary meaning is not necessary to

102. *Id.*

103. *Id.* at 777.

104. *Id.* at 771.

105. *Id.* at 772.

106. *Id.*

107. *Id.*

108. *Id.* at 773.

109. *Id.*

110. *Id.* at 773.

111. *Id.* at 774.

112. *Id.* at 774-75.

113. *Id.* at 775.

show a violation of Section 43(a).¹¹⁴ He noted that the original text of Section 43(a) did not mention trade dress (or trademarks for that matter), but court construction of it had extended its scope, consistent with the purposes of the Lanham Act, to include trade dress.¹¹⁵ He observed in a footnote that “[m]ost of the cases in which the Second Circuit has said that secondary meaning is required did not involve findings of inherent distinctiveness.”¹¹⁶

Justice Thomas concurred in the result,¹¹⁷ but felt that it was not necessary to make any reference to the requirements for registration under Section 2 when determining the scope of Section 43(a).¹¹⁸ Rather the language of Section 43(a) itself was broad enough to protect an arbitrary, fanciful, or suggestive package¹¹⁹ without regard to whether other sections of the Lanham Act might require proof of secondary meaning before according a trademark some sort of protection.¹²⁰

Comment:

There are several elements of a Section 43(a) case, and the Supreme Court’s holding dealt only with the element of the existence of a valid source identifier, i.e., a mark.¹²¹ The issue was whether

114. *Id.* at 784-85 (Stevens, J., concurring).

115. *Id.* at 776 (Stevens, J., concurring).

116. *Id.* at 781 n.14 (Stevens, J., concurring). Justice Stevens included the following in his footnote discussion:

For example, in *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299 (1981), *cert. denied*, 455 U.S. 909 (1982), the product at issue – a velcro belt – was functional and lacked ‘any distinctive, unique or non-functional mark or feature.’ 652 F.2d at 305. Similarly, in *Stormy Cline Ltd. v. ProGroup, Inc.*, 809 F.2d 971, 977 (1987), the court described functionality as a continuum, and placed the contested rain-jacket closer to the functional end than to the distinctive end. Although the court described the lightweight bag in *LeSportsac, Inc. v. K mart Corp.*, 754 F.2d 71 (1985), as having a distinctive appearance and concluded that the District Court’s finding of non-functionality was not clearly erroneous, *id.* at 74, it did not explain why secondary meaning was also required in such a case.

Two Pesos, 505 U.S. at 781 n. 14.

117. *Id.* at 785 (Thomas, J., concurring).

118. *Id.* (Thomas, J., concurring).

119. *Id.* at 786 (Thomas, J., concurring).

120. *Id.* at 787 (Thomas, J., concurring).

121. *Id.* at 764.

secondary meaning is necessary to establish the validity of such an identifier when the identifier is inherently distinctive.¹²² The Court did not deal with the question of functionality.¹²³ In fact, the Court noted that “it is also clear that eligibility for protection under [Section] 43(a) depends on nonfunctionality.”¹²⁴ Finally, the Court did not equate proof of distinctiveness with proof of likelihood of confusion, noting that “[i]t is, of course, also undisputed that liability under [Section] 43(a) requires proof of the likelihood of confusion.”¹²⁵

Trademark law has various counterpoises or opposites. The federal district court treated descriptiveness as opposite to inherent distinctiveness.¹²⁶ The Supreme Court accepted this legal conclusion, even though it apparently masqueraded as a fact(s) to be decided by a jury.¹²⁷ Such a conclusion is quite appropriate in the context of traditional word marks, e.g., Kodak, because inherently distinctive word marks are inherently source identifying.¹²⁸ However, it is not at all clear that descriptiveness and inherent distinctiveness are opposites when applied to restaurant decor trade dress. Simply importing the rules of Section 2 into Section 43(a) is not appropriate. The opinion of Justice Thomas is the most accurate on this point.¹²⁹

Taking the facts as given by the Court,¹³⁰ i.e., that the decor of the restaurant was inherently distinctive even without secondary meaning,¹³¹ the ratio I/C_s might be high, so that this trade dress should be recognized as a protectible trademark. It could be high only because C_s was negligible, not because I_s was significant. Traditionally, inherently distinctive marks are protected from their first use because such marks have no purpose other than source identification. An inherently distinctive trademark with little consumer recognition still has some identificatory power, i.e., I_s is not negligible. The decor of a restaurant that does not function as a source identifier certainly has purposes other than source

122. *Id.*

123. See *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1343 (C.C.P.A. 1982) (distinctiveness and nonfunctionality are legal requirements that must “be kept separate from one another”).

124. *Two Pesos*, 505 U.S. at 769.

125. *Id.*

126. *Id.* at 770.

127. *Id.*

128. *Id.* at 773.

129. *Id.* at 785-87 (Thomas, J., concurring).

130. *Id.* at 765.

131. *Id.* at 776.

identification. If so, the *Sears/Compco/Bonito Boats* doctrine would imply that state law cannot prohibit copying. Federal law should be no different.

There is something unsettling about ruling that the trade dress of a Mexican restaurant, located anywhere, but in this case in south Texas, could be inherently distinctive¹³² in the sense of its having identificatory and informational power. But once the point is conceded, the rest seems to follow, even without reliance on Section 2, as Justice Thomas argued.¹³³ The principle *expressio unius est alterius exclusio* applied to Section 2 of the Lanham Act, i.e., secondary meaning is named as a requirement only for descriptive marks and is therefore not a requirement for other types of marks, even as support and not as a controlling rule of statutory construction, quickly proves to be unsound. Instead, whether secondary meaning is required should, and ultimately does, turn on consumer expectations.

The Court spoke of Taco Cabana's trade dress as its "unique and informational device," even though it lacked secondary meaning.¹³⁴ The Court also indicated that the functionality doctrine adequately protects competition.¹³⁵ As long as the Court treated Taco Cabana's trade dress as a source identifier, its comments about functionality would be consistent with *Sears/Compco/Bonito Boats*. However, if the Court was implying that copying is not permitted unless a feature is functional, then the Court's holding goes beyond the spirit of *Sears/Compco/Bonito Boats*.

B. *Qualitex Co. v. Jacobson Products Co.*

In *Qualitex Co. v. Jacobson Products Co.*,¹³⁶ the United States Supreme Court held that color alone could sometimes be a protectible trademark.¹³⁷ For many years, Qualitex sold press pads to dry cleaners that were green-gold.¹³⁸ In 1989, a competitor, Jacobson, began selling press pads that were also green-gold.¹³⁹ Qualitex sued Jacobson.¹⁴⁰ Qualitex subsequently registered the color as a trademark

132. See Gleiberman, *supra* n. 48, at 2043.

133. *Two Pesos*, 505 U.S. at 785-86 (Thomas, J., concurring).

134. *Id.* at 771.

135. *Id.* at 775.

136. 514 U.S. 159.

137. *Id.* at 174.

138. *Id.* at 161.

139. *Id.*

140. *Id.*

in 1991.¹⁴¹ Qualitex prevailed in the district court.¹⁴² The United States Court of Appeals for the Ninth Circuit set aside the judgment by applying a rule that color alone could not be registered as a trademark.¹⁴³ This view differed from the view taken in other circuits,¹⁴⁴ and the Supreme Court granted certiorari.¹⁴⁵

The Court first observed that there was nothing in the language of the Lanham Act that would preclude treating color alone as a trademark.¹⁴⁶ Moreover, the court noted that color alone is capable of identifying a user's goods and distinguishing them from others.¹⁴⁷ The Court also observed that "a product's color is unlike 'fanciful,' 'arbitrary,' or 'suggestive' words or designs, which almost automatically tell a customer that they refer to a brand."¹⁴⁸ But with continued use, color alone may develop secondary meaning causing customers to come to treat it as signifying a brand.¹⁴⁹

The Court noted the basic objectives of trademark law as reducing a "customer's costs of shopping and making purchasing decisions."¹⁵⁰ Trademark law accomplishes these objectives by preventing competitors from copying a source-identifying mark so that potential customers may quickly and easily know that a particular item was made by the same producer as products with the same mark.¹⁵¹

At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product. The law thereby "encourage[s] the production of quality products," and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of an item offered for sale. It is the source-distinguishing ability of a mark – not its ontological status as color, shape, fragrance, word, or sign

141. *Id.*

142. *Id.*

143. 13 F.3d 1297 (9th Cir. 1994).

144. *Id.*

145. *Qualitex*, 514 U.S. at 159.

146. *Id.* at 162.

147. *Id.*

148. *Id.* 162-63 (emphasis in original; citations omitted).

149. *Id.* at 163.

150. *Id.* at 163-64, (quoting 1 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2.01[2] (3d ed. 1994)).

151. *Qualitex*, 514 U.S. at 163-64.

that permits it to serve these basic purposes.¹⁵²

With this analysis, the Court has apparently broadened the categories of things that may be protected as trademarks so that there are fewer limits, save that they actually function as trademarks.

The doctrine of functionality also does not support a per se rule concerning color.

“[A] product feature is functional,” and cannot serve as a trademark, “if it is essential to the use or purpose of the article or if it affects the cost or quality of the article,” that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage. Although sometimes color plays an important role (unrelated to source identification) in making a product more desirable, sometimes it does not. And, this latter fact — the fact that sometimes color is not essential to a product’s use or purpose and does not affect cost or quality — indicates that the doctrine of “functionality” does not create an absolute bar to the use of color alone as a mark.”¹⁵³

Qualitex’s green-gold press pads were not functional because there was no competitive need for the green-gold color.¹⁵⁴ Since the green-gold color identified Qualitex press pads to customers, there was no apparent reason the color should not be protected as a trademark.¹⁵⁵

The Court rejected respondent Jacobson’s other contentions that color alone should not be recognized as a trademark.¹⁵⁶ Lower courts can apply established principles to cases involving color to resolve difficult questions of shade confusion, just as they apply established principles to resolve other difficult questions.¹⁵⁷ The occasional problem of color depletion that might arise for particular products does not justify a blanket prohibition of treating color as a trademark; rather, the doctrine of functionality can prevent anticompetitive consequences in appropriate circumstances.¹⁵⁸ The Court rejected

152. *Id.* at 164 (quoting McCarthy, *supra* n. 150, at § 2.01[2] (other citations omitted)).

153. *Id.* at 165 (quoting *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 850 n.10 (1982) (other citation omitted)).

154. *Qualitex*, 514 U.S. at 166. This test of functionality is broader than what the Court apparently accepted later in *TrafFix*. *Cf.* 532 U.S. 23.

155. *Qualitex*, 514 U.S. at 166.

156. *Id.* at 174-76.

157. *Id.* at 167-68.

158. *Id.* at 168-69.

reliance on dicta from cases pre-dating the Lanham Act that might have suggested that color alone cannot be the subject of a trademark.¹⁵⁹ Finally, the Court rejected the argument that a rule protecting color as trade dress when it is part of a trademark is sufficient and instead held that color alone may be a trademark.¹⁶⁰

Comment:

In holding as it did, the Court opened for consideration the notion that some facets of a product may not automatically qualify for trademark protection, but might so qualify upon acquiring secondary meaning.¹⁶¹ The Court also opened the possibility that practically any facet of a product may function as a trademark and be protectible as such. The Court also made functionality a counterpoise to the better of the arguments traditionally raised against recognizing color alone as a trademark, i.e., shade confusion, color depletion.¹⁶² The Court reiterated a definition of functionality that it had stated earlier, i.e., a product feature that “is essential to the use or purpose of the article or . . . affects the cost or quality of the article,”¹⁶³ and added as an equivalent statement, “that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.”¹⁶⁴

The phrase “significant non-reputation-related disadvantage” contains both a quantitative (“significant”) and a qualitative (“non-reputation-related disadvantage”) aspect. The quantitative aspect seems to imply that a “little” non-reputation-related disadvantage may function as a trademark. This runs counter to the spirit of *Sears/Compco/Bonito Boats*, so that a competitor might be denied the right to copy a non-identificatory feature so long as that feature endowed the product with no “significant” advantage. The lower courts have equated this with a significant competitive disadvantage.¹⁶⁵ The Court would shortly have occasion to visit this question again in the context of trade dress after Congress had made its legislative contribution.

In *Qualitex, I*, was significant and could be significant only

159. *Id.* at 170-73.

160. *Id.* at 173-74.

161. *Id.* at 162-64.

162. *Id.* at 168-70.

163. *Id.* at 169.

164. *Id.*

165. See e.g. *Marketing Displays, Inc. v. Traffix Devices, Inc.*, 200 F.3d at 940.

because the green-gold color had secondary meaning. Otherwise consumers draw no particular conclusion upon seeing a product in a particular color. And only so long as *C*₁ is not great as considered on a case-by-case basis will color alone be protected as a trademark. It is worth noting that *Qualitex* involved a registered mark¹⁶⁶ and so was readily treated as an infringement case rather than an unfair competition case.

In the Trademark Amendments Act of 1999,¹⁶⁷ Congress added subsection (3) to Section 43(a). That provision places the burden of proving non-functionality on the one asserting protection for unregistered trade dress.¹⁶⁸

C. *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*

In *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*¹⁶⁹ the United States Supreme Court held that a product's trade dress, when comprised of the product itself, could be protected in an action under Section 43(a) of the Lanham Act only if the trade dress had acquired secondary meaning.¹⁷⁰ In *Wal-Mart*, plaintiff-respondent Samara Brothers designed and manufactured children's clothing and developed "a line of spring/summer one-piece seersucker outfits decorated with appliques of hearts, flowers, fruits, and the like."¹⁷¹ Chain stores sold this line of clothing.¹⁷² Wal-Mart and others developed knockoffs that it commissioned a supplier to produce.¹⁷³ Samara sued in the United States Federal District Court for the Southern District of New York.¹⁷⁴ A jury found in favor of Samara on all claims, including one for trade dress infringement under Section 43(a).¹⁷⁵ The district court awarded Samara \$1.6 million.¹⁷⁶ The United States Court of Appeals for the Second Circuit affirmed the denial of a judgment as a matter of law.¹⁷⁷

The Supreme Court noted that lower courts had extended

166. 514 U.S. at 161.

167. Pub. L. No. 106-43 § 5, 113 Stat. 218, 220 (1999).

168. See *id.*

169. 529 U.S. 205 (2000).

170. *Id.* at 216.

171. *Id.* at 207.

172. *Id.*

173. *Id.* at 208.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

protection to trade dress — first to containers and then to products themselves — under Section 43(a) and that the plaintiff in such actions must show that its mark is distinctive, either inherently or through secondary meaning.¹⁷⁸ The Court noted of Section 2 of the Lanham Act:

Nothing in [Section] 2 . . . demands the conclusion that *every* category of mark necessarily includes some marks “by which the goods of the applicant may be distinguished from the goods of others” *without* secondary meaning — that in every category some marks are inherently distinctive.¹⁷⁹

In light of what follows, this gloss on Section 2 is interesting. In *Two Pesos* the statutory requirement of secondary meaning for registration of descriptive marks supported the conclusion that other classifications of marks did not require secondary meaning.¹⁸⁰ In *Wal-Mart*, such language apparently does not compel the conclusion that some classes of marks are entitled to protection, regardless of the mark’s classification.¹⁸¹ Indeed, color can never be inherently distinctive, and secondary meaning is needed for its protection¹⁸² because a color “does not ‘almost *automatically* tell a customer that [it] refer[s] to a brand,’ and does not ‘immediately . . . signal a brand or a product source.’”¹⁸³

The Court held that a product’s design is to be treated the same as colors.¹⁸⁴

[D]esign, like color, is not inherently distinctive. The attribution of inherent distinctiveness to certain categories of word marks and product packaging derives from the fact that the very purpose of attaching a particular word to a product, or encasing it in a distinctive packaging, is most often to identify the source of the product. . . . [W]here it is not reasonable to assume consumer predisposition to take an affixed word or packaging as indication of source . . . inherent distinctiveness will not be found. . . . In the case of product design, as in the case of color, we think consumer

178. *Id.* at 209-11.

179. *Id.* at 211 (emphasis in original).

180. *Two Pesos*, 505 U.S. at 763.

181. 529 U.S. at 205.

182. *Id.* at 212.

183. *Id.* (emphasis in original).

184. *Id.* at 213.

predisposition to equate the feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs . . . is intended not to identify the source, but to render the product itself more useful or more appealing.¹⁸⁵

A rule protecting trade dress should not injure consumers who seek utility and esthetics in their products by facilitating competitors' suits against each other.¹⁸⁶ Rather the developer of a trade dress can seek protection through a design patent or a copyright.¹⁸⁷

The Court distinguished *Two Pesos* by saying that that case did not involve product design trade dress, but rather product packaging trade dress or something akin to product packaging (*tertium quid*), which can be inherently distinctive.¹⁸⁸ The Court indicated that close cases involving the distinction between product design and product packaging should be resolved in favor of concluding that they involve product design and therefore require secondary meaning for protection under Section 43(a).¹⁸⁹

Comment:

The Court's holding confines *Two Pesos* to cases of product packaging, i.e., to cases where the thing to be protected is something that a consumer would expect to denote source.¹⁹⁰ This helps to move the law of trade dress in the direction of protecting the interest of consumers who benefit from competition.¹⁹¹ The presumption in cases of trade dress product design is that competitors should have free access to those designs.¹⁹² Remarkably, this position is not that different from the positions taken in the cases decided by the Second Circuit with which the Supreme Court took issue in *Two Pesos*.¹⁹³ In *Vibrant Sales, Inc. v. New Body Boutique, Inc.*,¹⁹⁴ the court held that plaintiff could prevail in an action for trade dress infringement of a

185. *Id.* at 212-13 (emphasis in original).

186. *Id.* at 213.

187. *Id.* at 214.

188. *Id.* at 215.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. 505 U.S. at 763.

194. 652 F.2d 299, 301 (2d Cir. 1981), *cert. denied*, 455 U.S. 909 (1982).

“Waist Away” belt only if it proved secondary meaning.¹⁹⁵ In *Stormy Clime Ltd. v. Progroup, Inc.*,¹⁹⁶ the court held that plaintiff could prevail in an action for trade dress infringement of a raincoat with vents that facilitated the release of perspiration only if it proved secondary meaning.¹⁹⁷ And in *LeSportsac, Inc. v. K Mart Corp.*,¹⁹⁸ the court held the plaintiff could prevail in an action for trade dress infringement of lightweight luggage and bags because it showed secondary meaning and because the defendant failed to establish functionality.¹⁹⁹ Thus, all of these cases involved product configuration trade dress. In contrast, *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*,²⁰⁰ the case that the Fifth Circuit relied upon to establish the rule of inherent distinctiveness for trade dress later approved by the Supreme Court in *Two Pesos*,²⁰¹ involved the trade dress of bottles, clearly packaging trade dress.²⁰²

The value of the quotient I/C_s is not great in the case of product design trade dress that has no secondary meaning because the value of I_s is zero when the identifier is neither expected to function as such nor does function as such. Even if the value of C_s in matters of product design is negligible, the value of I/C_s is still zero (0) — meaning that it has no identificatory power. Moreover, copying features that make a product “more useful or more appealing” does not affect C_s , but certainly does affect the level of interbrand competition. Hopefully, the Court has made this, rather than attractiveness of an unpatented, uncopyrighted product, the touchstone of legal protection of a product’s trade dress.²⁰³ Interestingly the court in *Keene Corp.* applied its rule of aesthetic

195. *Id.* at 301.

196. 809 F.2d 971 (2d Cir. 1987).

197. *Id.* at 974.

198. 754 F.2d 71 (2d Cir. 1985).

199. *Id.* at 75.

200. 659 F.2d 695 (5th Cir. 1981), *cert. denied*, 457 U.S. 1126.

201. 505 U.S. at 767.

202. *Chevron Chemical*, 659 F.2d at 696.

203. *But cf. Keene Corp. v. Paraflex Indus., Inc.*, 653 F.2d 822, 825 (3d Cir. 1981) (“

The difficulty with accepting a broad view of aesthetic functionality, which relates the doctrine to the commercial desirability of the feature at issue without consideration of its utilitarian function, is that it provides a disincentive for development of imaginative and attractive design. The more appealing the design, the less protection it would receive. As our ambience becomes more mechanized and banal, it would be unfortunate were we to discourage use of a spark of originality which could transform an ordinary product into one of grace.”).

functionality to find a feature functional and copiable by defendant.²⁰⁴ By saying that the developer of a trade dress can seek protection through a design patent or a copyright, the Court has taken a step to make *Sears/Compco/Bonito Boats* applicable to Section 43(a) trade dress cases.

D. *TrafFix Devices, Inc. v. Marketing Displays, Inc.*

In *TrafFix Devices, Inc. v. Marketing Displays, Inc.*,²⁰⁵ plaintiff-respondent MDI owned two utility patents for a mechanism that incorporated two springs to keep outdoor signs from blowing over in adverse wind conditions.²⁰⁶ MDI established a successful business and claimed that buyers and users recognized its stands because of their visible dual-spring design.²⁰⁷ After the patents expired, defendant TrafFix had MDI's product reverse engineered and produced a competing copy.²⁰⁸ MDI sued and alleged, among other things, that TrafFix had infringed its trade dress.²⁰⁹ The United States Federal District Court for the Eastern District of Michigan determined that the dual-spring design was the only element of MDI's trade dress at issue.²¹⁰ The District Court held as a matter of law, by way of summary judgment, that MDI had failed to establish secondary meaning and that in any event the design was functional.²¹¹

The United States Court of Appeals for the Sixth Circuit reversed both determinations of the District Court.²¹² The Court of Appeals observed that "it took 'little imagination to conceive of a hidden dual-spring mechanism or a tri- or quad-spring mechanism that might avoid infringing [MDI's] trade dress.'"²¹³ A competitor who chose a dual-spring design would have to find some other way to set its product apart so as to avoid infringing MDI's trade dress.²¹⁴ With regard to functionality, the Court of Appeals implied a standard by holding "that allowing exclusive use of a particular feature such as the dual-spring design in the guise of trade dress would 'hinde[r]

204. *Id.*

205. 532 U.S. 23.

206. *Id.* at 1258.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 1258-59.

213. *Id.* at 1259.

214. *Id.*

competition somewhat.’ Rather ‘[e]xclusive use of a feature must “put competitors at a *significant* non-reputation-related disadvantage” before trade dress protection is denied on functionality grounds.’”²¹⁵

The United States Supreme Court granted certiorari to resolve a conflict in the circuits on the issue of “whether the existence of an expired utility patent forecloses the possibility of the patentee’s claiming trade dress protection in a product’s design.”²¹⁶ The Court noted that courts of appeals have held that the Lanham Act provides a claim for infringing a distinctive trade dress, and that Congress implicitly endorsed these determinations by amending the Lanham Act to provide that the person asserting a right to protection of an unregistered trade dress must prove that the matter to be protected is not functional.²¹⁷

The Court observed that this allocation of the burden of proof plus its own admonition in *Wal-Mart* not to over-extend protection of trade dress “give force to the well-established rule that trade dress protection may not be claimed for product features that are functional.”²¹⁸ Implicitly, then: “trade dress protection must subsist with the recognition that in many instances there is no prohibition against copying goods and products. In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying.”²¹⁹ Such copying is part of our competitive economy.²²⁰

The Court then restated and modified the question before it and stated its conclusion:

The principal question in this case is the effect of an expired patent on a claim of trade dress infringement. A prior patent, we conclude, has vital significance in resolving the trade dress claim. A utility patent is strong evidence that the features therein claimed are functional. If trade dress protection is sought for those features the strong evidence of functionality based on the previous patent adds great weight to the statutory presumption that features are deemed functional until proved otherwise by the party seeking trade dress protection. Where the expired patent claimed the fea-

215. *Id.* (quoting *Qualitex v. Jacobsen Prods. Co.*, 514 U.S. 159, 165 (1995) (emphasis in original)).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 1260.

220. *Id.*

tures in question, one who seeks to establish trade dress protection must carry the heavy burden of showing that the feature is not functional, for instance by showing that it is merely an ornamental, incidental, or arbitrary aspect of the device.²²¹

The Court's grant of certiorari was to resolve a conflict, and this excerpt shows that the Court did not unconditionally take either side in that conflict. Rather the Court adopted the view that trade dress protection is not foreclosed when there is a utility patent,²²² but the burden on the one claiming infringement is so high²²³ that such foreclosure may be the practical effect of the Court's language. A claimant must overcome the statutory presumption of functionality of Section 43(a)(3), a presumption made stronger by the presence of an expired utility patent, perhaps by affirmatively showing that the design is an "ornamental, incidental, or arbitrary aspect of the device."²²⁴

The Court held that MDI's trade dress claim was barred under the rule just established: "MDI did not, and cannot, carry the burden of overcoming the strong evidentiary inference of functionality based on the disclosure of the dual-spring design in the claims of the expired patents."²²⁵ In reaching this conclusion, the Court examined evidence concerning the patent itself and its history.²²⁶ Plaintiff-respondent had prevailed in an infringement case against one whose design was sufficiently like that of TrafFix to establish that TrafFix's product would have infringed plaintiff-respondent's patent,²²⁷ nearly a form of collateral estoppel without mutuality. Statements in the patent application as well as in the course of patent prosecution "demonstrate[d] the functionality of the design."²²⁸ Thus, in order to procure a patent and to protect it against infringement, the patent holder must act at cross purposes to a later claim of trade dress protection under Section 43(a).²²⁹

The Court considered the proper definition of functionality and

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1261.

229. *Id.* at 1261-62.

rejected the Sixth Circuit's requirement of competitive necessity.²³⁰ Instead, the Court held that

a feature . . . is functional when it is essential to the use or purpose of the device or when it affects the cost of quality of the device. . . . Where the design is functional under [this] formulation there is no need to proceed further to consider if there is a competitive necessity for the feature.²³¹

Thus, "competitive necessity," a functionality standard that allows less copying than "essential to the use or purpose of the device or . . . [affecting] the cost of quality of the device," is *not* a necessary element of functionality.²³²

Once functionality is established, secondary meaning is not an issue²³³ nor do competitors have to explore the existence of alternative designs.²³⁴

If buyers are assured the product serves its purpose by seeing the operative mechanism that in itself serves an important need. It would be at cross-purposes to those objectives, and something of a paradox, were we to require the manufacturer to conceal the very item the user seeks.²³⁵

A product feature may identify functionality to a consumer as well as the product's origin — and when it does identify functionality, competitors may freely copy it.²³⁶

"[A]rbitrary, incidental, or ornamental aspects of features of a product found in the patent claims" may be protected if the "*manufacturer* could . . . prove that those aspects do not serve a purpose within the terms of the utility patent."²³⁷ If a design feature claimed is a "useful part of the invention," then competitors may copy it.²³⁸

230. *Id.*

231. *Id.* at 1262-63.

232. *Id.* at 1261.

233. *See id.* at 1262 (applying rule); *Restatement (Third) of Unfair Competition*, §17, comment *a* (1995) (Functional design is ineligible for protection regardless of inherent or acquired distinctiveness.).

234. *See TrafFix*, 532 U.S. at 33-34.

235. *Id.*

236. *Id.*

237. *Id.* (emphasis added)

238. *Id.*

The Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity. The Lanham Act, furthermore, does not protect trade dress in a functional design simply because an investment has been made to encourage the public to associate a particular functional feature with a single manufacturer or seller.”²³⁹

This language should give new vigor to competitors’ right to copy, irrespective of whether a product feature is functional.

TrafFix argued that the Patent Clause of the Constitution “of its own force, prohibits the holder of an expired utility patent from claiming trade dress protection.”²⁴⁰ The Court stated that it need not resolve this question,²⁴¹ even though it appears to be the point of conflict among the courts of appeal that the Court granted certiorari to resolve.²⁴²

Comment:

In *TrafFix*, the Court relied on Section 43(a)(3) plus the policy of the patent laws to move functionality in the direction of greater rights of competitors than that given by lower courts under their construction of the “significant non-reputation-related disadvantage” standard of functionality.²⁴³ The Court applied that standard, but reduced the quantitative measure of the standard (i.e., “significant”) so that the non-reputation-related advantage that enables competitors to copy a product feature on the basis of functionality need be less than many lower courts had previously thought.²⁴⁴ Mere usefulness may be sufficient when there is a utility patent thrown into the mix.²⁴⁵

The counterpoise considered by the Court was in fact between distinctiveness and functionality.²⁴⁶ The Court elevated the evidentiary effect of a utility patent in establishing functionality, indeed the Court nearly seemed to equate the two when it offered

239. *Id.* at 1262-63.

240. *Id.* at 1263.

241. *Id.*

242. *Id.*

243. *Id.* at 1261-62.

244. *Id.* at 1262-63.

245. *Id.* at 1262.

246. *Id.*

that disproving functionality may be accomplished by showing that a product feature is “merely . . . ornamental, incidental, or arbitrary.”²⁴⁷ Moreover, the Court noted that competitive necessity is not an element of functionality.²⁴⁸ This goes far to restore to competitors a right to copy.

Even if we assume that *I*_r is not insignificant, the value of *C*_s is significant when a putative identificatory and informational feature is the basis of a utility patent. The Court makes the low cost of alternatives a factor in the functionality determination when it suggests that plaintiff could disprove functionality by demonstrating that the feature is “merely . . . ornamental, incidental, or arbitrary”²⁴⁹ — i.e., that there is nearly an unlimited availability of alternatives.

V

Conclusion

The United States Supreme Court should interpret Section 43(a) consistently with the constitutional rules it has laid down for state tort law. In *Sears/Compco/Bonito Boats*, the Court established a broad right to copy product features not sufficiently reflecting invention or creativity to be worthy of a patent or copyright.²⁵⁰ In *Ives/Qualitex* the Court set down rules governing functionality that permit copying of source-identifying feature(s) when there is competitive need to copy.²⁵¹ Taken together, and observing that the principles are *not* co-terminal, these rules further interbrand competition to the greatest extent possible in the area of trade dress.

A problem in Section 43(a) jurisprudence is the tendency of courts to view various elements of a claim as opposites, i.e., counterpoises, of each other. There are well-established opposites in trademark law. For example, descriptive or generic word marks are opposite from inherently distinctive word marks. But the elements of a trademark infringement case whose outcome will benefit consumers include (1) an actual valid source identifier, (2) concurrent use, (3) likelihood of confusion, and (4) non-functionality. Proof of any one of these elements does not prove any of the other elements — or

247. *Id.* at 1260.

248. *See id.* at 1261.

249. *Id.* at 1260.

250. *Bonito Boats*, 489 U.S. at 143; *Compco*, 376 U.S. at 237; *Sears*, 376 U.S. at 231.

251. *Qualitex*, 514 U.S. at 164.

disprove any of them. Inherent distinctiveness does not preclude the possibility that a mark might be functional.²⁵² Inherent distinctiveness does not preclude the possibility that consumers are not likely to be confused by a competitor's use.²⁵³ Nor does non-functionality preclude the possibility that a feature has no identificatory and informational power and as such is not a valid trademark. Distinctiveness does not preclude the possibility that a product feature is functional.²⁵⁴

Each element of a claim is a necessary element in promoting interbrand competition that maximizes consumer value. Protection of a product feature with no identificatory power provides consumers nothing, but it does deprive them of the benefits of competition.²⁵⁵ Treating a product feature as a non-functional source identifier when its aesthetic appeal is necessary to compete or when it in fact identifies nothing of relevance to consumers, denies consumers the benefits of competition. "If a feature renders a product desirable for any reason other than association with a source or sponsor, then it is 'functional' (i.e., serves a function other than identification of source)."²⁵⁶

The Court has clearly moved in the direction of promoting interbrand competition at the expense of competitors who want the same protection that the Stiffel Lamp Company wanted under the state tort law of Illinois.²⁵⁷ Those who lament that our existence becomes more mechanized and banal when the spark of originality can be copied²⁵⁸ should realize that most trade dress is not significantly original. Patent and copyright laws should define what is not banal. Indeed, the United States Court of Appeals for the Third Circuit, in writing about such banality, could as easily have been talking about pole lamps.²⁵⁹ Whether utilitarian or aesthetic, competition benefits consumers more than protection of non-

252. See discussion of *Two Pesos*, *supra* Part IV; *In re Morton-Norwich*, 671 F.2d at 1343.

253. See discussion of *Two Pesos*, *supra* Part IV.

254. See *id.*

255. See generally Lisa H. Johnston, *Drifting Toward Trademark Rights in Gross*, 85 Trademark Rep. 19 (1995) (arguing that courts' views on trademark licensing, trade dress, secondary meaning in the making, and dilution are gradually transforming trademark rights into rights in gross to the detriment of competition beneficial to consumers).

256. Wong, *supra* n. 44, at 1133.

257. *Sears*, 376 U.S. 225 (Sears copied Stiffel's pole lamp; competitor's protection against product copying provided by Illinois tort law unconstitutional.).

258. See *Keene Corp.*, 653 F.2d at 825.

259. See *id.*

identificatory product features.²⁶⁰

Interbrand competition is promoted when I/C_x has value. The Court correctly broadens legally protected sources of information to anything, irrespective of their ontological status,²⁶¹ but the Court has reasserted in so many words that the I_x associated with such a “source” cannot be 0 or negligible.²⁶² Consumers must recognize a product identifier as such in order for a product feature to have identificatory power. Consumer expectations are certainly relevant. Consumers do indeed expect that packaging is an identifier; they do not expect the product itself to be a source identifier.²⁶³ The non-patented, non-copyrighted, unrecognized trade dress cannot put competitors at a disadvantage, i.e., raise C_s ,²⁶⁴ at all.

Section 43(a) should be construed in such a way that consumers, not the competitors who use trademarks, are paramount. While congressional power under the Patent/Copyright Clause and the Commerce Clause of the Constitution may be broad when combined, according consumers a paramount place in the competitive market economy requires a clear demarcation between the two. Section 43(a) should not be a surrogate for patent or copyright protection.²⁶⁵

260. See Wong, *supra* n. 44, at 1167 (“Courts should conclude, as they did on the issue of utilitarian features, that aggressive price competition better serves the public than the encouragement of innovation for aesthetic features.”).

261. See discussion of *Two Pesos* and *Qualitex*, *supra* Part IV.

262. See discussion of *Qualitex* and *Wal-Mart*, *supra* Part IV.

263. See discussion of *Two Pesos* and *Wal-Mart*, *supra* Part IV.

264. See discussion of *TraFFix*, *supra* Part IV.

265. See *Trade-Mark Cases*, 100 U.S. at 93-94 (The Court struck down early trademark legislation insofar as it constituted an exercise of congressional power “to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.” A trademark is not an “invention or discovery” (patent) nor a “writing” (copyright).).